



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1088 OF 2011

DANIEL GITHINJI WAIGANJO.....CLAIMANT

VERSUS

KENPIPE CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as an Accounts Assistant for a fixed term contract starting 10.3.1992. His basic salary was Kshs.37,320 per month plus House Allowance of Kshs.1,000, 30 days annual leave, Kshs.900 leave allowance, Kshs.6,000 medical allowance and gratuity at the rate of 25% of basic pay upon successful completion of the contract. The contract was terminable by either party giving 3 months notice or paying salary in lieu of the said notice. However the employer could still dismiss the claimant summarily on ground of gross misconduct. The contract was renewed after every 3 years cycle upto March 2007 when the last contract term commenced. After the end of every contract period, the claimant was paid his gratuity. With time he rose through the ranks to Deputy Manager earning Kshs.78,815 basic pay, Kshs.35,000 House Allowance Kshs.38,810 fuel allowance and Kshs.4,000 responsibility Allowance totally to Kshs.151,625 gross pay.

2. On 4.4.2007, the claimant was given a letter suspending him to pave the way for an investigation into irregular financial payments done from the respondent's Account at the Co-operative Bank. On 14.4.2007, he was summoned to appear before the Disciplinary Committee of the respondent after which he was exonerated of any misconduct. Thereafter he received the respondent's letter dated 1.8.2007 advising him to report back to work on 6.8.2007.

3. When he reported to work as advised, he was not allowed to resume work but instead, he was directed to apply for 30 days' leave and he complied while still on leave, he received a letter from the employer informing him that she had commenced restructuring its establishment with intention to improve internal control and efficiency in service delivery. She further advised him to apply for any suitable position in her new structure upon advertisement. The claimant never applied for any of the positions advertised as advised.

4. On 17.9.2007, a day before his leave ended, he received a letter from the respondent terminating his services with immediate effect for failure to apply for any job after the advertisement following the restructuring process. The claimant was offended by the sudden turn of events and filed this suit by way of a plaint in the High Court on 19.3.2008 seeking separation dues totaling to Kshs.12,397,413, general damages costs and interest. The respondent filed defence set off/counter claim on 11.4.2008 and amended the same on 28.4.2008. The set off/counterclaim was for loans advanced to the claimant by the respondent of which Kshs.1.7 was still owing and recovered from his guarantors. The claimant further filed Reply to defence and counter claim on 30.4.2008.

5. On 15.6.2011, the suit was transferred to the defunct Industrial Court and the parties directed to align their pleadings with the rules of procedure of the defunct court which they did by filing a Claim and Reply to the claim. Thereafter this court was established by dint of Article 162(2)(a) of the constitution and took over the same. Onyango J heard the parties and rendered herself in favour of the claimant but upon appeal by the respondent, the judgment was set aside on legal technicality by the Court of Appeal and fresh trial before another judge was ordered.

6. On 1.10.2018, the matter was placed before me for hearing but by consent, the parties sought the court's direction to adopt the evidence and the submissions presented to the first trial court and write a judgment. I granted the directions sought but further invited the counsel to highlight on the said submissions which they did on 30.10.2018 in the open court.

7. After careful consideration of the pleadings evidence and the submissions presented by both parties herein, the facts of the case are not in

dispute. The issues for determination are:-

- (a) Whether the reliefs sought by the claimant should be granted.
- (b) Whether the set off/counter claim should be allowed.

Reliefs sought by the claimants

8. The claimant sought the following remedies vide his statement of claim.

(a) A declaration that the termination of the claimant's services was wrongful, irregular, and lawful.

(b) Payment of the following:-

- (i) 3 months salary in lieu of NoticeKshs. 454,875
- (ii) Days worked but not paid.....Kshs. 736,925
- (iii) 206 leave days earned but not utilized
At 1.5 rate..... Kshs.1,339.310
- (iv) Gratuity Kshs. 709,335
- (v) Severance pay for 14 years.....Kshs.3,783,120
- (vi) Personal savings (shares)Kshs. 809,153

Total Kshs.7,832,718

- (c) General damages for breach of contract
- (d) Punitive, exemplary and aggravated damages.
- (e) Costs and interest.
- (f) Any other reliefs which the court deems fit and just to grant.

Declaration of wrongful termination

9. The claimant contended that termination was wrongful because it was prematurely done without serving the required prior notice. In his view he was terminated on account of redundancy after the restructuring exercise. The respondent has however blamed the claimant for the termination by failing to apply for a suitable job after restructuring as advised.

10. There is no doubt in my mind that the main reason for the termination of the claimant's services was redundancy following a restructuring process by the respondent. The repealed Employment Act, which was in force in 2007 never defined redundancy but adopted the definition in the Trade Disputes Act by dint of section 16A(2). Section 2 of the Trade Disputes Act defines redundancy as follows:-

"... the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiate of the employer where services of an employee become superfluous, and in the practices commonly known as abolition of office, job or occupation and loss of employment due to the kenyanization of business; but does not include any such loss of employment by a domestic servant;"

11. The procedure for terminating the services of an employee on account of redundancy as at 2007 was provided in mandatory term under section 16A(1) of the repealed Employment Act as follows:

"16A(1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:-

- (a) The union of which the employee is a member and the labour officer in charge of the area where the employee shall be notified of the reasons for and the extent of the intended redundancy.*
- (b) The employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the class of employees affected by the redundancy;*

(c) No employee shall be placed at a disadvantage for being or not being a member of the trade union.

(d) Any leave due to any employee who is declared redundant shall be paid off in cash.

(e) An employee declared redundant shall be entitled to one month's notice or one month's wages lieu of the notice.

(f) An employee declared redundant shall be entitled to severance pay at the rate of not less than fifteen days pay for each completed year of service."

12. The foregoing mandatory procedure was subject to section 4(5) of the Trade Disputes Act which provided as follows:

"4(5) Termination of employment through redundancy shall whether or not there is agreement between the Employer and the employee as to the terms of the redundancy, be deemed to constitute a trade dispute for the purposes of subsection (4) and termination of employment shall not be effected until the matter has been reported to the minister under that subsection; and the minister may thereupon confirm the terms of the redundancy where he is satisfied that there is agreement between the employer and employee or, in any other case, invoke the settlement procedure set out in the following sections of this part."

13. After considering the termination letter dated 17.9.2007 vis-a-vis the provisions of section 16A of the Employment Act and section 4(5) of the Trade Disputes Act, I find that the termination of the claimant herein was not in full compliance with the mandatory procedure provided for redundancies. The claimant was not served with a prior notice, the labour officer was not informed of the reason and the extent of the redundancy and that the redundancy and terms of separation dues had not been approved by the Labour Minister. The termination was therefore premature and irregular and I so hold.

14. The termination letter stated as follows in paragraph one;

"Following the restructuring of Kenpipe Sacco, as was advertised in the Daily Nation of 13th and 14th August 2007, and subsequent interviews held at both KUSCCO (31st August, 4th September, 2007) and Kenpipe Plaza (7th September 2007) offices; we regret to inform you that your services with the Sacco are terminated with effect from 18th September 2007."

Salary in lieu of Notice

15. The claimant prayed for 3 months salary in lieu of notice as per the terms of the contract signed in 1992 and which as renewed automatically by the parties conduct. Her further contended that the terms of the contract were never changed save for the salary increase. The respondent on the other hand relied on clause 26 of the Employee Handbook passed in June 2007.

16. After careful consideration of the evidence by defence witnesses, I have not seen any proof of whether and/or when the said Employee Handbook came into force and whether and/or when the claimant was notified of the same before the termination. I therefore return that the said Handbook was never part of the Claimant's employment contract.

17. Even if the Handbook was published to the claimant, I am of the view that the same constituted general guidelines on the respondent's HR policy and cannot replace or undo express terms of contract of an individual employee. The Court of Appeal in **Kenya Revenue Authority vs Menginya Salim Murgani [2010]eKLR** while discussing the doctrine of freedom of contract of service held that either party to a contract is allowed to terminate the contract by giving the notice stipulated in the contract or a reasonable notice if non is specifically stipulated in the contract or alternatively, tender equivalent salary in lieu of notice. In this case the notice period was expressly stipulated in the contract as 3 months or salary in lieu of the notice. I therefore return that the claimant is entitled to 3 months salary in lieu of notice as per the express terms of his contract being **Kshs.155,625 x 3 = Kshs.454,875.45**.

Unpaid emoluments

18. The claimant pleaded for Kshs.736,925 but no particulars were given. I will therefore only award the amount admitted by Rw1 in her written statement dated 14.2.2011 annexing a schedule of dues assessed being Kshs.275,913.53.

Leave earned but not taken

19. The claimant pleaded 206 leave days not utilized and paid to be for a cash payment at 1.5 rate. The respondent denied that claim and averred that it was not possible. The claimant relied on leave application form dated 6.8.2007 signed by the respondent's Vice Chairman indicating that he had 315 leave day and after taking 30 days on that day he still had a balance of 285 leave days. The respondent also produced leave application form signed by the claimant on 6.8.2007 seeking 30 days but without indication of the accrued leave days.

20. The burden of keeping employment record including leave records is on the employer. In this case, the employer has not produced the leave register and all other records to disprove the claimant's claim for 206 days. Without any record to the contrary, I return that the leave application form dated 6.8.2007 indicating 285 accrued leave for the claimant is evidence enough that the claimant did not utilize all his earned leave.

21. The foregoing finding is fortified by the evidence of Rw2 during cross examination when he confirmed that there are occasions when the claimant applied for leave but he would get less than what he sought.

Going by the said leave application form dated 6.8.2007, the claimant had 285 leave days but he prayed for 206 which I am persuaded that he

is entitled to. Unless otherwise stipulated under the contract, leave is paid based on the basic salary I therefore award him **Kshs.78815.15 x 206/26 = Kshs.624,458.50.**

Gratuity

22. The contract of service provided for 25% of the basic salary for the contract term. It is common knowledge that the claimant was paid his gratuity for each completed contract period from 1992 to March 2007. That in the last contract cycle, he served for only 6 months and the respondent undertook to pay gratuity earned vide the termination letter. She then assessed the amount payable as Kshs.123,048.75 (see the schedule annexed to the written statement by Rw1). The claimant prayed for Kshs.709,335 but gave no particulars. Consequently, I grant the amount offered by the respondent.

Severance pay

23. The claimant prayed for severance pay for the aggregate period of 14 years served. He prayed for a sum Kshs.3,783,120 based on 15 days gross pay per year of service. The respondent submitted that the claim for severance pay stretching for 14 years amounts to unjust enrichment. She contended that the claimant had completed all the previous 3 year contracts and received the gratuities therefore. She therefore urged that the claim for severance pay herein should be restricted to the last contract where the claimant served for only 9 months.

24. I agree with the defence that granting the severance pay for contracts which do not form part of the dispute save for leave not utilized would amount to unjust enrichment to the claimant at the expense of the respondent. The 3 years fixed term contracts between 1992 and 2007 were distinct from each other and that was confirmed by the claimant's acknowledgement of the gratuities to signify an end for each separate contract.

25. In the already expired contracts, the claimant lost nothing through the redundancy declared during the last contract which commenced in March 2007. Since under section 16A of the repealed Employment Act provided for severance pay for each completed year of service at the rate of 15 days' pay, I dismiss the claim for severance pay because the redundancy was declared before completion of one year in the new contract.

Personal Savings/Sacco shares

26. This claim for Sacco shares is best suited for determination before the Cooperative Tribunal which has the original jurisdiction to determine disputes between cooperative societies including Saccos and their members.

General damages

27. This claim has no basis both in law and the contract of service herein and as such, it is dismissed. The position in law as at 2007 was as held by the Court of Appeal in *Kenya Revenue Authority vs Menginya Salim Murgani [2010]eKLR* that the total damages for breach of employment contract was the total earnings during the notice period.

Punitive, exemplary and Aggravated Damages

28. In view of foregoing decision of the Court of Appeal, I dismiss the claim for punitive, exemplary and aggravated damages. Even if the reliefs was provided in law, I must say that no evidence was tendered to support the said claim.

Set off/ counter claim

29. In the Amended defence and set off/counterclaim, the respondent prayed for Kshs.1,777,753.18 loan, Kshs.202,000 for fridge and cooker and Kshs.13,000 overpaid leave totaling Kshs.1,992,753.19 plus 13.8% interest equaling to Kshs.2,126,620 as at 1.4.2008. He prayed that the sum attracts further interest at 13.8% till payment in full. The respondent has not demonstrated the context in which the sacco Loans were advanced to the claimant. I therefore leave that dispute, if any, to the Cooperative Tribunal which is clothed with the original jurisdiction to determine disputes between Saccos and their members and/or officers. I say so fully aware that under paragraph 20 of the Respondent's Statement of Reply filed on 13.4.2012 it was admitted that:

“As at the time of filing this case in the High Court of Kenya, the outstanding loan was Kshs.2,126,620.00 together with interest thereon at the rate of 13.8% from 1/4/2008 until payment in full. The loan has since been repaid by the guarantors.”

Conclusion and disposition

30. I have found that the claimant's fixed contract was prematurely and wrongfully terminated by the respondent on account of redundancy. I have further found that save for the claim for accrued leave days, the dispute in this case is confined to the 3 years fixed term contract that commenced in March 2007. Finally, I have found that the claimant is entitled to 3 months salary in lieu of notice, unpaid salary arrears, 206 leave days not utilized and gratuity for 6 months and not the rest, which are declined. Consequently, I enter judgement for the claimant against the respondent in the following terms.

(a) Notice..... Kshs.454,875.45

(b) Salary arrears Kshs. 275,913.53

(c) Accrued leave..... Kshs.624,458.50

(d) Gratuity..... Ksh. 123,048.75

Total **Kshs.1,478,296.25**

=====

The claimant is also awarded costs plus interest at the courts rate from the date of filing the suit. The award will however be paid less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March 2019

ONESMUS N. MAKAU

JUDGE